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In the Supreme Court of the United States

OCTOBER TERM, 1984

GLASS PACKAGING INSTITUTE, ET AL., PETITIONERS

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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Petitioners contest the court of appeals' ruling that they lack standing to challenge the decision of the Bureau of Alcohol, Tobacco and Firearms (BATF) to allow liquor to be sold in plastic polyethylene terephthalate (PET) bottles.

1. The Secretary of the Treasury is authorized to regulate the kinds of containers used to bottle distilled spirits "whenever in his judgment such action is necessary to protect the revenue" (26 U.S.C. 5301(a)).[1] In 1955, the Secretary promulgated regulations permitting distillers to use liquor bottles "made of glass, or earthenware, or other suitable material approved by the Director [of the BATF]" (26 C.F.R. 175.17 (1955)).

[1]As the court of appeals noted (Pet. App. A4), the integrity of the materials in which liquor is packaged can have a direct effect on the volume of alcohol and, consequently, on the amount of taxes to be collected by the United States.

The Food and Drug Administration also regulates the types of packaging that may be used for alcoholic beverages under the authority of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 301 *et seq.* In 1973, the FDA, after notice and comment rulemaking, approved the use of PET plastic in containers used for alcoholic beverages not exceeding 50% alcohol by volume. See Pet. App. A4.

On October 5, 1982, the BATF issued a final rule, effective November 5, 1982, amending its definition of permissible liquor bottles to include bottles "made of glass or earthenware, or of other suitable material approved by the Food and Drug Administration * * * and which has been determined by the Director [of the BATF] to adequately protect the revenue" (27 C.F.R. 19.11). One day before the final rule was to become effective, petitioners, the Glass Packaging Institute and its president, William W. Sadd, brought this action in the United States District Court for the District of Columbia to enjoin the BATF from approving PET liquor bottles. Petitioners argued, inter alia, that the BATF had violated the rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. 553, by failing to follow the Act's notice and comment procedures. The district court dismissed petitioners' suit on the merits (Pet. App. A24-A32). Among other things, the court held that the BATF's approval of PET was an interpretative rule, exempt from the APA's notice and comment rulemaking requirements (*id.* at A27-A29).

2. The court of appeals affirmed the district court's dismissal of the action without reaching the merits (Pet. App. A1-A23). The court noted that the only interest asserted by petitioners was " 'the right to market distilled beverage containers free of competition from containers approved in an illegal fashion' " (*id.* at A10 (citation omitted)). Concluding that the statute invoked by petitioners, 26 U.S.C. 5301(a), was drafted solely to enable the Secretary of the

Treasury to protect the revenue and not to regulate competition among liquor bottle manufacturers (Pet. App. A11), the court held that petitioners lacked standing because their asserted interest was not within the zone of interests to be protected or regulated by the statute in question (*id.* at A10-A15).

3. Petitioners do not challenge the court of appeals' conclusion that Congress's sole purpose in enacting 26 U.S.C. 5301(a) was the protection of the federal revenue. In addition, petitioners do not argue that they have any claim related to the statutory interest in protecting the revenue.[2] Instead, petitioners' principal argument is that this Court should overrule or clarify the zone of interests test because, as applied in this case, the result may be that no one has standing to challenge the BATF's approval of PET bottles (Pet. 13). There is no merit to this argument, and review by this Court is not warranted.

a. Whatever petitioners may think of the test, the requirement that a plaintiff demonstrate that his asserted injury is within the zone of interests to be protected or regulated by the statutory or constitutional guarantee in question is now firmly established in this Court's standing jurisprudence. See, *e.g.*, *Allen* v. *Wright*, No. 81-757 (July 3, 1984), slip op. 12; *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982); *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 n.6 (1979); *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U.S. 318, 320-321 n.3 (1977); *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 39 n.19 (1976); *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 227

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[2]Petitioners advanced such a claim at oral argument in the court of appeals, but the court rejected it as groundless (Pet. App. A12 n.28).

n.16 (1974); *United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 686 n.13 (1973); *Sierra Club* v. *Morton*, 405 U.S. 727, 733 & n.5 (1972); *Investment Co. Institute* v. *Camp*, 401 U.S. 617, 620 (1971); *Arnold Tours, Inc.* v. *Camp*, 400 U.S. 45, 46 (1970); *Barlow* v. *Collins*, 397 U.S. 159 (1970); *Ass'n of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970). Moreover, the zone of interests test serves an essential function in the demarcation of the proper roles for courts and legislatures. The prudential limitations on standing, including the zone test, stem from "concerns 'about the proper — and properly limited — role of the courts in a democratic society.' " *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 80 (1978) (quoting *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975)). As the Court has explained (*id.* at 500):

> Without such [prudential] limitations — closely related to Art. III concerns but essentially matters of judicial self-governance — the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions * * *.

The zone of interests test is particularly well suited to address such concerns. As the District of Columbia Circuit has recognized (*Tax Analysts & Advocates* v. *Blumenthal*, 566 F.2d 130, 140 (1977), cert. denied, 434 U.S. 1086 (1978) (footnote omitted)):

> The zone test, by its very language, implicates the relationship between the legislative and judicial branches as the predominant factor in its operation — "the zone of interests to be protected or regulated by the *statute* . . . in question." Thus, the zone test serves the purpose of allowing courts to define those instances

when it believes the exercise of its power at the instigation of a particular party is not congruent with the mandate of the legislative branch in a particular subject area.

In the present case, there can be no doubt that the exercise of judicial power at the instigation of petitioners would "not [be] congruent with the mandate" of Congress as expressed in Section 5301(a) of the Internal Revenue Code. Indeed, this is a case in which there is no relationship whatsoever between petitioners' interests and the statute they have invoked.[3] To allow parties whose only interest is in protecting their competitive position to challenge action taken under a statute passed for the protection of the revenue — particularly in a case in which petitioners do not even allege that the BATF has not adequately protected the revenue — would needlessly inject the judiciary into matters that Congress clearly entrusted to the Secretary of the Treasury. Moreover, the fact that no one may have standing to challenge the BATF's decision is no reason to grant petitioners standing. See *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. at 227. The better-reasoned conclusion is that Congress intended to vest the Secretary of the Treasury with sole discretion to decide what types of packaging materials adequately protect the revenue.

b. Contrary to petitioners' argument (Pet. 10-11), the decision below does not conflict with this Court's decision in *Data Processing, supra*. *Data Processing* was predicated

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[3]Petitioners appear to suggest (Pet. 13-14) that they may invoke the APA as a basis for standing. But the APA contains its own zone of interests limitation; 5 U.S.C. 702 grants a right of judicial review to persons aggrieved "within the meaning of a relevant statute." As the court of appeals noted (Pet. App. A10), the statute invoked by petitioners in this case is 26 U.S.C. 5301(a), and petitioners are not aggrieved within the meaning of that statute.

on the finding that "Congress had arguably legislated against the competition that the petitioners sought to challenge." *Investment Co. Institute* v. *Camp*, 401 U.S. at 620. Here, by contrast, Congress has not even arguably legislated on the subject of competition among bottlemakers. Thus, the decision below is fully consistent with this Court's precedents.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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[4]Petitioners contend (Pet. 15-18) that review is necessary because lower courts have not applied the zone test in a consistent fashion. But none of the cases cited by petitioners construes the statute at issue in this case; thus, this is a case of first impression. Cf. *Allen* v. *Wright*, slip op. 13 (The rules of standing "cannot be defined so as to make application of the constitutional standing requirement a mechanical exercise."). In any event, petitioners' reliance on cases in which lower courts failed to apply the zone of interests test is no reason to grant review in a case in which the test was properly applied. Finally, petitioners' suggestion (Pet. 16) that the Eighth Circuit does not follow the zone of interests test is erroneous. See, *e.g.*, *Taylor* v. *Jones*, 653 F.2d 1193, 1207 (1981); *Churchill Truck Lines, Inc.* v. *United States*, 533 F.2d 411, 416-417 (1976).

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